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IN THE

Supreme Court of the United States

October Term, 1951.

No. 262

JOSEPH B. MICHEL,
Petitioner,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Railroad Company.

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To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This brief is filled in opposition to the petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit filed herein by Joseph B. Michel on 21 August 1951.

It is respectfully submitted that this case is not one in which the Court should exercise its discretion of issuing a writ of certiorari. Rule 38(5) of the Rules of this Honorable Court provides that such review is not a matter of right, but of sound judicial discretion, and that it will be granted only where there are special and important reasons therefor. This rule embodies the consistent practice and the holdings of this Honorable Court. In *Magnum Company v. Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531, Mr. Chief Justice Taft observed:

> "...The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes, first to secure uniformity of decisions between those courts in the nine circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing ..." (p. 163.)

Likewise in *Deputy v. DuPont*, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363, in his dissenting opinion setting forth reasons why he felt that certiorari should not have been granted, Mr. Justice Roberts described considerations in the issuance of writs of certiorari as follows:

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which in-

volves no important principle of law and no conflict of decisions amongst the federal courts. (p. 500.)

It is submitted that the instant case does not qualify for the issuance of a writ of certiorari according to either of these criteria. As appears from the decision of the Court of Appeals for the Fifth Circuit, its holding is consistent with the uniform holding of other Circuit Courts and District Courts:

> "...Consequently, there would appear no reason for not enforcing in such instances the fundamental principle that where one of two inconsistent remedies are available, the election of one precludes recourse to the other. *This has been the uniform holdings, correctly we think, of the Courts which have considered this question.*" (Citing Reynolds v. Denver & Rio Grande Western R. Co., 174 F. 2d 673; Kelly v. Nashville, Chattanooga & St. Louis Ry., 75 F. Supp. 737 and cases cited; Ramsey v. Chesapeake & Ohio R. Co., 75 F. Supp. 740, and citations; Hecox v. Pullman Co., 85 F. Supp. 34.) (Opinion, page 6; Italics added.)

Consequently, it is submitted that a writ of certiorari herein can be sought only on the ground that the question is one of importance which it is in the public interest to have decided by this Honorable Court.

As to this, it is submitted that the question herein at issue is not of particular importance nor is it in the public interest that it be decided by this Honorable Court. The proceeding is one to recover damages for alleged breach of a contract. Petitioner's suit was dismissed by the Dis-

trict Court and the dismissal upheld by the Court of Appeals, on the ground that he had elected an alternative and mutually exclusive remedy, viz. a proceeding before the National Railroad Adjustment Board to enforce his supposed rights under the contract. As is pointed out by the Court of Appeals in its opinion, there was a voluntary election on petitioner's part to proceed in this manner and the Railway Labor Act provides that awards of the National Railroad Adjustment Board created thereby "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award..." (Opinion, page 5.)

It is submitted that the statement made in petitioner's petition that he was powerless to appeal from the National Railroad Adjustment Board's decision (Paragraph IX (c)) does not constitute a correct statement of law. The fact is not that petitioner was powerless to appeal from the Board's decision, but that he elected not to do so and this election is the basis of the decision of the District Court and the Court of Appeals. The fact that the proceeding was nominally by petitioner's union (as pointed out by the Court of Appeals, with petitioner's full knowledge and approval and at his vigorous insistence that his rights be protected (Opinion p. 2)) did not prevent his seeking jurisdictional review of the validity of the decision as an interested party. If he could not have had the decision itself reviewed, he could have had its validity reviewed for a determination of its sufficiency according to the requirements of due process or other questions of constitutional sufficiency. This he failed to do and thereby became bound by his election of remedies.

As is pointed out by the Court of Appeals the purpose and effect of the Railway Labor Act and the finality of its decisions have received exhaustive consideration by this Honorable Court in the cases of *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 534, 70 S. Ct. 577; *Elgin J. & E. R. Co. v. Burley*, 325 U. S. 711, 90 L. Ed. 928, 66 S. Ct. 721, 327 U. S. 661, 89 L. Ed. 1886, 65 S. Ct. 1282 and on review of *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430 (Opinion pages 2-4), so that further consideration of the effect and validity of this act is not warranted.

Nor, it is submitted, is it accurate to say that this Honorable Court has held that the right to pursue one's common law remedy in the courts is not lost by resorting to the National Railroad Adjustment Board (Petition paragraph IX(b)). Neither of the two decisions cited in support of this contention lends it any support.

In the *Elgin, J. & E. R. Co. v. Burley* case, your Honors held that an Adjustment Board award was not binding upon a railroad employee if he had not authorized or acquiesced in the submission of his claim to the Board by his collective bargaining representative. Nowhere did your Honors say that an award procured at the instance of one such as petitioner may be ignored by him and a common law action brought by him to try anew the same question which was presented to the Board.

In the *Slocum v. D. L. & W. R. Co.* case the question presented to your Honors was whether the National Railroad Adjustment Board had exclusive administrative juris-

diction of controversies between a union and a carrier growing out of an interpretation of agreement between them. No question as to methods of enforcement of individual rights was presented or necessary to your Honors' decision.

CONCLUSION.

It is submitted that the petition for a writ of certiorari filed herein does not demonstrate either conflict of decisions between Courts of Appeals nor a question of importance which it is in the public interest to have decided by this Honorable Court. It is therefore submitted that your Honors' discretion should be exercised against the granting of the writ of certiorari applied for herein.

Respectfully submitted,

(SGD.) **HARRY McCALL**
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CERTIFICATE OF SERVICE.

I certify that a copy of this brief has been served upon Maurice B. Gatlin, Counsel for Petitioner, by delivering same to him at his office, 1816 National Bank of Commerce Building, New Orleans 12, Louisiana, this 7th day of September 1951.

(SGD.) **HARRY McCALL**

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HARRY McCALL.